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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PAUL J. ANDERSON, Plaintiff and Appellant, v. WEST MARINE, INC., et al., Defendants and Respondents.	B207477 (Los Angeles County Super. Ct. No. BC381931)

APPEAL from an order of the Superior Court of Los Angeles County. Alan S. Rosenfield, Judge. Affirmed.

Yvonne M. Renfrew for Plaintiff and Appellant.

Greenberg Traurig, Frank E. Merideth, Jr. and Thomas H. Godwin for Defendants and Respondents West Marine, Inc., Pamela J. Fields, Ian C. Ballon, and Greenberg Traurig, LLP.

Gibson, Dunn & Crutcher, Kevin Rosen and Margaret A. Farrand for Defendants and Respondents Dow Lohnes PLLC and Jonathan Hill

Gaims, Weil, West & Epstein, Alan Jay Weil and Steven S. Davis for Defendant and Respondent Manatt, Phelps & Phillips, LLP.

INTRODUCTION

Appellant Paul J. Anderson ("Anderson") appeals from the judgment entered upon the trial court's orders sustaining: (1) respondents'[1] demurrers to Anderson's malicious prosecution complaint without leave to amend; (2) granting respondents' special motion to strike Anderson's malicious prosecution action pursuant to Code of Civil Procedure section 425.16;[2] and (3) awarding costs to respondents. The trial court sustained the demurrers without leave to amend on the grounds that Anderson's complaint for malicious prosecution was barred by the two-year statute of limitations in § 335.1 and also as to certain parties, under the one-year statute of limitations in § 340.6.

In the underlying action forming the basis of Anderson's malicious prosecution action, Anderson filed a motion to strike under section 425.16; the trial court denied the motion and Anderson filed an appeal. The Court of Appeal reversed, concluding that section 425.16 applied and issued a remittitur directing the trial court to grant the motion to strike. The trial court in the instant action found that statutes of limitation, sections 335.1 and 340.6 commenced to run when the Court of Appeal issued the remittitur in the underlying action. The trial court concluded that because Anderson had waited more than two years after the remittitur was issued in the underlying action to file his malicious prosecution claim against respondents, the malicious prosecution claim was time-barred under section 335.1 or 340.6.[3] Before this court Anderson argues the lower court did not

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[1] Respondents on appeal: West Marine, Inc., Pamela J. Fields, Ian C. Ballon, and Greenberg Traurig, LLP; Manatt, Phelps & Phillips; Dow Lohnes PLLC and Jonathan Hill.

[2] All references to statute are to the Code of Civil Procedure unless otherwise indicated.

[3] The lower court also granted respondents' special motions to strike Anderson's complaint in part because Anderson could not meet the burden of showing a probability that he would prevail on his malicious prosecution action in view of the application of the statute of limitations.

apply the correct statute of limitations to the malicious prosecution action; and in the alternative, that the statute of limitations under sections 335.1 and 340.6 did not commence until the lower court in the underlying action entered judgment, rather than upon the issuance of the appellate court's remittitur. Moreover, Anderson contends that even if the statute of limitations period had accrued respondents should be estopped from relying on statute of limitations protections due to the unique circumstances of the underlying action. For the reasons set forth below, we disagree. Accordingly we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Underlying Action

This dispute arises out of an action brought by respondent West Marine against Anderson in which Anderson was accused of breach of contract, breach of duty of loyalty, trade libel, intentional interference with economic advantage, and negligent interference with economic advantage. Respondent West Marine based its claims on seven messages that were posted by the entity "CauseIKnow" on Yahoo.com's financial message board for West Marine, Inc. Because CauseIKnow's messages appeared to be based on confidential information having been known to only a limited number of high-level West Marine employees, West Marine concluded that the person who posted the messages was a former employee of such stature, prompting West Marine to file the underlying action.

Without disclosing his identity, CauseIKnow filed a special motion to strike West Marine's complaint under § 425.16. During the briefing on the motion, and in an apparent effort to refute some of West Marine's underlying claims, Anderson revealed his identity. West Marine filed an opposition to the motion to strike. Upon learning of Anderson's true identity, West Marine obtained leave to amend its complaint. West Marine amended its complaint, omitting the original causes of action except for breach of contract and adding a new cause of action for violation of California's Uniform Trade Secrets Act. On November 19, 2003, the trial court denied Anderson's special motion to

strike, and Anderson appealed. On appeal, the court reversed, holding that the motion to strike should have been granted. The court remanded the matter to the trial court with directions to grant the motion to strike. On April 15, 2005, the appellate court's remittitur was issued.

Following the issuance of the remittitur the parties continued to litigate matters pertaining to attorneys' fees. Anderson waited until November 18, 2005, to seek an order dismissing the underlying action. Parties then litigated the merits of the request for an order of dismissal. On December 16, 2005, the trial court, per the Court of Appeal's directive, granted the motion to strike and entered judgment.

II. Instant Action for Malicious Prosecution

On December 7, 2007, Anderson filed this action for malicious prosecution against respondents based on the underlying action. Respondents filed demurrers to the complaint, contending that Anderson's action for malicious prosecution was time-barred. Specifically, respondents argued that Anderson's complaint was time-barred under section 335.1 because it was filed more than two years after the Court of Appeal issued its remittitur in the underlying action.[4] Respondents asserted that the two-year statute of limitations controlled cases of malicious prosecution, as held by the court in *Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190, 197. Relying on *White v. Lieberman* (2002) 103 Cal.App.4th 210, 217, that the statute of limitations began to run upon entry of the remittitur by the Court of Appeal. Respondents further argued that Anderson's

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[4] The various parties invoked different arguments for their defense. The West Marine respondents all relied upon the two-year statute of limitations found within section 335.1 as well as the one-year statute of limitations found under section 340.6. In their demurrers, the law firms of Manatt, Phelps & Phillips and Dow Lohnes relied upon section 340.6, citing its application to and coverage of lawyers in all instances, except for actual fraud.

action was barred by the one-year statute of limitations found in section 340.6. Respondents argued that because Anderson waited more than one year to file his complaint from the time that he should have discovered the facts underlying his malicious prosecution claim he was time-barred in bringing an action against those parties that were attorneys.

In addition to their demurrer, the West Marine respondents filed a motion to strike the complaint for malicious prosecution under section 425.16, in which they argued, among other things, that prosecution of the underlying lawsuit was protected by their constitutional rights to petition and free speech.

Anderson opposed the demurrers and motion to strike. In regard to section 335.1, Anderson argued that the statute did not apply to instances of malicious prosecution since malicious prosecution was not explicitly stated in the language of the statute. Furthermore, Anderson argued that amendments to section 335.1 rendered personal injury inapplicable to malicious prosecution, that it now fell under a different statute, and therefore reliance on section 335.1 was wrong. Anderson also opposed the demurrers asserting that even if section 335.1 applied, his malicious prosecution action was timely under the theory that the two-year period under commenced upon entry of judgment at the trial court.

As to section 340.6, Anderson argued that the statute of limitations only applied to "the performance of an attorney's professional *services*" and that such a statute of limitations applied "only to claims made by persons *for or to whom 'professional services' have been provided*." Anderson argued that section 340.6, therefore, was limited to instances of legal malpractice and could not be applied against third parties that were not clients of the attorney(s) in question.

Regarding the motion to strike, Anderson argued that the attorney defendants lacked standing to invoke such a motion. Anderson based this argument, among other things, on the theory that standing could only be afforded to the person whose own free speech rights were the basis for the suit in which the motion was brought. Anderson further attacked the merits of the motion to strike by claiming that defendants lacked

probable cause for dismissal under section 425.16. Anderson also claimed defendants lacked probable cause because they had no evidentiary basis – that the internet postings for which Anderson was sued were made with malice and, therefore, were not actionable under Civil Code section 47, subdivision (c).

On March 24, 2008, the trial court entered judgment in favor of the Respondents and sustained the demurrers on the grounds that section 335.1's two-year statute of limitations governed malicious prosecution claims (*Stavropoulos v. Superior Court, supra,* 141 Cal.App.4th at p. 197). The court further held that Anderson's complaint was time-barred by section 335.1 because more than two years had passed since the issuance of the Court of Appeal's remittitur, the point in time when the statute of limitations began to run (*White v. Lieberman, supra,* 103 Cal.App.4th at p. 217). Additionally, the court ruled that section 340.6 barred Anderson's malicious prosecution action against the attorney defendants.

On April 22, 2008, Anderson filed a timely notice of appeal.

DISCUSSION

Before this court Anderson challenges the ruling (in sustaining all three demurrers) on the theories that neither section 335.1 nor section 340.6 apply and that the statute of limitations did not begin to run until judgment was issued in the trial court (as opposed to at the time of the Court of Appeal's issuance of the remittitur). As we shall explain, the court properly concluded as a matter of law that Anderson could not proceed with his malicious prosecution action because it is time-barred by the statute of limitations.

I. Standard of Review

In reviewing the sustaining of a demurrer, an appellate court treats the demurrer as admitting all material facts properly pled and matters subject to judicial notice, but not

deductions, contentions, or conclusions of law or fact. (*Cadlo v. Owens-Illinois, Inc.*, (2004) 125 Cal.App.4th 513, 519.) We also read the complaint as a whole and its parts in context, giving it a reasonable interpretation. (*Ibid.*) Evidentiary facts found in recitals of exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.) When a demurrer is sustained, we determine if the complaint states facts sufficient to constitute a cause of action. (*Cadlo v. Owens-Illinois, Inc.*, *supra*, 125 Cal.App.4th at p. 519.) When it is sustained without leave to amend, we decide if there is a reasonable possibility that the defect can be cured by amendment. If so, the trial court abused its discretion, and the judgment is reversed. The plaintiff bears the burden of proving the reasonable possibility of cure. (*Ibid.*)

Moreover, for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows merely that the action may be barred. (*McMahon v. Republic Van & Storage Co.* (1963) 59 Cal.2d 871, 874.) The ultimate question for review is whether the complaint showed *on its face* that the action was barred by a statute of limitations, if so, only then may a general demurrer be sustained and a judgment of dismissal entered thereon. (*Moseley v. Abrams* (1985) 170 Cal.App.3d 355, 358.) Because the trial court's determination on demurrer is made as a matter of law, we review the ruling de novo. (*Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415, 1423.)

II. The Trial Court Properly Sustained the Demurrers as Based on the Statute of Limitations in sections 335.1 and 340.6

Before this court Anderson argues that the lower court erred as a matter of law in sustaining the demurrers without leave to amend. First he argues that the court applied the incorrect statute of limitations to the malicious prosecution claim. Anderson contends that neither the two-year statute of limitations in section 335.1 nor the one-year statute of limitations period in section 340.6 applied in this case. Instead he suggests that the four-year "catch-all" statute of limitations period in section 343 should have been applied

here. Second he claims that even if sections 335.1 and 340.6 applied to his claim, the trial court erred in concluding that they commenced to run upon the Court of Appeal's remittitur in the underlying action. In Anderson's view, the lower court's entry of judgment triggered the statute of limitations. Finally, he claims that because of the respondents' actions post-remittitur and prior to the entry of judgment, respondents should be estopped from claiming that the issuance of the remittitur commenced the running of the statute of limitations. He further asserts that malicious prosecution is, in this case, a "continuing tort" and thus the statute of limitations does not commence to run until the respondents' last act in the underlying litigation. As we shall explain, the trial court properly concluded as a matter of law that Anderson could not proceed with his malicious prosecution action because it was time-barred by the statute of limitations.

A. Sustaining of the Demurrers Based on the Statute of Limitations Under Section 335.1

Section 335.1 provides for the commencement period of actions as follows: "[w]ithin two years: An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another." While section 335.1 does not expressly indicate its application to malicious prosecution actions it has been held to apply to such claims. (*Stavropoulos v. Superior Court, supra,* 141 Cal.App.4th at p. 197.) In *Stavropoulos*, the court considered the question of whether malicious prosecution was covered by the statute of limitations found within section 340, subdivision (c) or section 335.1. (*Stavropoulos, supra,* at p. 193.) In answering this question the court looked at the legislative histories of the two statutes and the history of the treatment malicious prosecution has received by California's courts and legislature. (*Id*. at pp. 194-195.) The court held that the early language of section 340, subdivision (c) encompassed "all infringements of personal rights as opposed to property rights" (*Stavropoulos, supra,* at p. 194; see also *Simons v. Edouarde* (1950) 98 Cal.App.2d 826, 828). The court also held that amendments over time to section 340, subdivision (c), and

the subsequent creation of section 335.1, made section 335.1 the governing statute of limitations for matters of personal injury. (*Stavropoulos, supra,* at p. 196.)

Considering the legislative history of section 335.1, the *Stavropoulos* court concluded that malicious prosecution is covered by the section's two-year statute of limitations. (*Id.* at p. 197.) The amendments that altered section 340, subdivision (c) and created section 335.1 were enacted in order to ensure that the survivors of victims of the events on September 11, 2001, were able to bring complaints before the court within a two-year time frame, as opposed to the original one-year time frame laid out in earlier versions of the statute. As explained in *Stavropoulos*, "judicial decisions consistently held that for the purposes of limitations malicious prosecution is to be grouped with injuries to the person." (*Id.* at p. 196.)

This conclusion was further supported by previous holdings. (*Storey v. Shasta Forests Co.* (1959) 169 Cal.App.2d 768, 769-770; *Dept. of Mental Hygiene v. Hsu* (1963) 213 Cal.App.2d 825, 826-827.) In *Hsu* the court indicated that malicious prosecution was a personal injury and not an injury to property because malicious prosecution does not involve "an obligation or liability not founded upon an instrument in writing." (*Dept. of Mental Hygiene v. Hsu, supra,*213 Cal.App.2d at p. 827.) In view of the history of the statute and the prior case law the court in *Stavropoulos* held that section 335.1 is the appropriate statute of limitations for malicious prosecution actions because malicious prosecution is an injury affecting the person rather than property.

Anderson acknowledges the holding in *Stavropoulos* but challenges it, believing it is wrong in light of amendments found in the legislative history as well as Supreme Court case law. Anderson asserts that section 335.1 should apply only to personal injuries, and that malicious prosecution should be excluded. Anderson further claims that malicious prosecution is not a personal injury based on the decision in *Gourley v. State Farm Mutual Automobile Insurance Company* (1991) 53 Cal.3d 121. *Gourley*, however, was a case concerning the limited proposition that prejudgment interest under Civil Code section 3291 should not be awarded on a claim of a violation of the covenant of good faith and fair dealing in an insurance agreement because such a cause of action arose

from the interference with a property right (a contract obligation). While the court mentioned and considered malicious prosecution in its reasoning, its primary concern was Civil Code section 3291. The court's reference to malicious prosecution came in the context of discussing a Pennsylvania case, *Wainauskis v. Howard Johnson Co.* (1985) 339 Pa. Super. 266, which involved a malicious prosecution claim where the court held that statutory pre-judgment interest was not appropriate because the malicious prosecution action was based on a financial loss rather than a personal injury. (*Id.* at p. 282.) By extension, the *Gourley* court reasoned that, "a malicious prosecution action is based on financial loss rather than personal injury." (*Gourley, supra*, 53 Cal.3d at p. 130.) In so holding, *Gourley* addressed the difference between causes of action suing to vindicate property rights versus those brought to vindicate personal rights.

Anderson's arguments are unconvincing. Anderson overstates the value of *Gourley* to the issues before this court. Anderson argues that the Supreme Court announced a "new" view on malicious prosecution – i.e., to the effect that malicious prosecution is an action based upon financial loss resulting from the infringement of property interests rather than personal injuries. The California Supreme Court made no such holding in *Gourley*, however. In *Gourley*, the Court neither examined nor decided such an issue—the nature of the right vindicated by a malicious prosecution action was not squarely before the Supreme Court in *Gourley*. Further, the court's *Wainauskis* reference was not to "hold" that malicious prosecution actions vindicate property/financial rights, but instead merely to point out that certain states do not award prejudgment interest in those cases where parties seek to vindicate an interference with an economic right and that in Pennsylvania malicious prosecution is characterized as an action seeking redress for such interference. There is no California Supreme Court case law which characterizes malicious prosecution in the manner urged by Anderson.

Anderson also argues that malicious prosecution is not a personal injury under section 335.1 because to assume such would create an inconsistency in the law since an entity suing for malicious prosecution cannot be said to have suffered a "personal injury." Anderson's hypothetical problem does not exist in the instant case. Here Anderson—the

party asserting the malicious prosecution claim—is a person, not an entity. In any event, the nature of the injury or the infringement remains unchanged, regardless of the plaintiff's status. A malicious prosecution plaintiff's lawsuit seeks to vindicate the right to be free from being sued in the absence of probable cause. As such, malicious prosecution is analogous to those personal injuries included in section 335.1. As observed by *Hsu*, malicious prosecution is more accurately described as injury caused by the wrongful act of another than an injury resulting from the breach of an obligation or agreement. Such injury is the same irrespective of the status of the plaintiff and thus should apply to all plaintiffs.

Moreover, Anderson's argument regarding the 2002 amendment to section 335.1, which amended the statute to include the term "individual," is unconvincing since such an alteration was not meant to further limit section 335.1's application, but rather to allow individuals additional time to bring lawsuits relating to the events of September 11, 2001. The amendment should not be construed as to create the inconsistency Anderson now suggests.

In sum, Anderson has not presented any basis for us to depart from *Stavropoulos*. Furthermore, the California Legislature is deemed to be aware of all judicial decisions that pertain to statutes, both enacted and amended. The fact that the courts have consistently applied such an approach to malicious prosecution in *Stavropoulos* and other cases, and that the legislature took no action to correct such judicial construction, implies an approval of the court's continued approach. Had the legislature disagreed with this treatment of malicious prosecution we are confident action would have been taken to explicitly codify its proper place in California law. In short, the trial court did not err in deciding to apply section 335.1 to Anderson's malicious prosecution action.

B. Sustaining the Demurrers Based on the Statute of Limitations Under Section 340.6

Section 340.6, subdivision (a) provides:

> "An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist: (1) The plaintiff has not sustained actual injury; [¶] (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred; [¶] (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation, and [¶] (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action." (§ 340.6, subds. (a)(1)-(4).)

First, turning to Anderson's argument that section 340.6 applies only to claims of malpractice actions, we do not agree. Section 340.6 was created to combat the rising costs of malpractice insurance for attorneys, costs that were and are prone to increase even when an attorney faces charges not defined as "malpractice." (*Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1368.) Section 340.6 has a long history of being applied to non-malpractice claims arising from breach of contract, negligence, breach of fiduciary duty, and negligent misrepresentation. (See e.g., *Quintillani v. Mannerino* (1998) 62 Cal.App.4th 54, 67 [breach of contract, breach of fiduciary duty, negligent misrepresentation]; *Stoll v. Superior Court*, *supra*, 9 Cal.App.4th at pp. 1368-1369 [breach of fiduciary duty].) In short, contrary to Anderson's argument, section 340.6 has never been limited to apply solely to malpractice claims. The plain language of the statute makes clear that the legislature intended that the only exemption would be for actual fraud.

Anderson also argues that section 340.6, does not apply to claims brought by non-clients. To support this claim, Anderson relies on *Knoell v. Petrovich* (1999) 76

Cal.App.4th 164, stating that the "only" case in which a third party attempted to invoke section 340.6 was rejected by the Second District Court of Appeal in *Knoell.* In *Knoell*, the court considered only the issue of whether a tolling provision in section 340.6 applied to a third party or non-client. The court concluded that the tolling provision in the statute only applied to toll the limitations periods where the attorney continued to represent the client, and as such non-clients could not rely upon the provision to toll the running of the statute of limitations period in section 340.6. Nothing in the opinion addresses the other aspects of the statute as it may apply to non-client claims. (See *id.* at p. 169.) That the court chose to limit its analysis to the matter of tolling leaves open the option for attorney's to rely on the limitation period contained in section 340.6 when he or she is defending against a claim brought by a non-client. This conclusion is further supported by the fact that narrowing the applicability of section 340.6 would defeat the purpose of the statute. Because neither the language nor legislative history of section 340.6 supports a view that section 340.6 applies only to malpractice claims brought by clients and because the court's holding in *Knoell* was limited to the issue of tolling, we hold that the trial court was correct in its judgment that section 340.6 applied to the malicious prosecution claim that Anderson brought against the attorney respondents.

C. The Statute of Limitations Commences Upon Entry of Remittitur

Anderson challenges the trial court's conclusion that the statute of limitations commenced when the Court of Appeal issued its remittitur in the underlying action. According to Anderson, the statute of limitations commenced not at the time that the Court of Appeal issued its remittitur in the underlying action, but rather when the judgment was entered in the trial court.[5] For the reasons set forth, we disagree.

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[5] This issue concerning the commencement of the statute of limitations is germane only as to the non-attorney respondents because as to the attorney-respondents, as we

"[W]hen reversal of a trial court judgment in the Court of Appeal gives rise to a possible cause of action for malicious prosecution, the statute of limitations first begins to run on the date the Court of Appeal issues its remittitur." (*White v. Lieberman* (2002) 103 Cal.App.4th 210, 214.) "In cases affirmed on appeal, the statute of limitations begins running again on the issuance of the remittitur. There is no reason that the same rationale should not apply to reversals. […] Affirmance or reversal, the remittitur activates the statute of limitations." (*Id.* at p. 217.) Establishing and applying the *White* rule allows for uniformity and predictability when addressing the question of when a statute of limitations commences. Included within the *White* court's reasoning was the understanding that failure to have such a uniform and predictable rule would allow one party to delay entry of judgment for as long as possible (and thus delay commencement of the limitation period). (*Ibid.*)

"A necessary element of a cause of action for malicious prosecution is that the underlying proceeding has been terminated favorably to the malicious prosecution plaintiff. The requirement of favorable termination confirms the plaintiff's innocence." (*Ray v. First Federal Bank of California* (1998) 61 Cal.App.4th 315, 318.) The Court of Appeal's remittitur constituted a favorable termination of the case. As set forth in *Ray,* a disposition by the Court of Appeal can have the affect of favorably terminating a case for a party, for the purposes of a malicious prosecution action. (*Id.* at pp. 318-319.)

In reversing the trial court's decision and issuing its remittitur, the Court of Appeal favorably terminated the underlying action for Anderson. The only matter the parties litigated after the issuance of the remittitur was the attorneys' fees and the requested order of dismissal, neither of which could have changed the outcome of the Court of Appeal's conclusion. Indeed, Appellant's decision to delay entry of judgment at the trial

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conclude elsewhere, the one-year statute of limitations under section 340.6 applies. As such, even were we to agree with Anderson that the statute of limitations did not commence until the trial court entered judgment, the claims against the attorney-respondents would still be untimely as they were filed more than one-year after the trial court entered judgment, and thus time-barred under section 340.6.

court level is a prime example of the "windfall" parties would reap that the court warned of in *White*.

Anderson has not provided any convincing argument for us to reject *Ray* or *White*. Furthermore, Anderson's reliance on *Rare Coin Galleries, Inc.* and *Scannell,* and his argument that the limitation period commenced upon entry of judgment in the trial court do not persuade us. Insofar as *Rare Coin Galleries, Inc.* is concerned, the question before the court was, among other things, a distinct one of tolling the limitations period when judgment was entered at trial and later affirmed on appeal. (See *Rare Coin Galleries, Inc. v. A-Mark Coin Company, Inc.* (1988) 202 Cal.App.3d 330.) More specifically, in *Rare Coin* the court did not consider the issue of what event triggered the statute of limitations in the first instance, but instead it found the statute was tolled during the appeal and then recommenced when the appellate process ended. (*Id.* at p. 335.) In *Rare Coin*, the court made it clear this was its concern as it stated, "The sole issue for our consideration is at what point is the appeal process exhausted." Like *Rare Coin*, *Scannell* speaks to a situation where favorable termination – i.e., judgment in the trial court – had occurred. (*Scannell v. County of Riverside* (1984) 152 Cal.App.3d 596, 616.) As the *Ray* court observed, *Rare Coin* does "not address the situation and issue in this case, whether favorable termination may occur in the first instance by reason of an appellate disposition." (*Ray v. First Federal Bank of California, supra,* 68 Cal.App.4th at p. 319.) Thus, *Rare Coin* does not speak to the matter before us. Because the Court of Appeals' remittitur favorably terminated the underlying action, it commenced the limitation period.

D. Anderson's Continuing Tort Theory

In the alternative, Anderson asserts that respondents' conduct after the Court of Appeal issued its remittitur makes the alleged malicious prosecution a "continuing tort," which thereby would mean Anderson's complaint is not time-barred by the two-year statute of limitations. Anderson contends that respondents' actions fall under the category of a continuing tort because the continued litigation post-remittitur amounted to

a continued wrong. (*Zamos v. Stroud* (2004) 32 Cal.4th 958; *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385.) As a result of a cause of action being a continuing tort, Anderson posits that the statute of limitations would not begin to run until the date of the last injury or when the tortious acts ceased.

Anderson's arguments do not persuade us. Anderson takes the language of the *Zamos* and *Sycamore* courts and attempts to create from whole cloth the determination that because malicious prosecution includes the act of continuing to prosecute a lawsuit known to lack probable cause it therefore is a continuing tort. Such is not the case. That continuing to prosecute a case known to lack probable cause constitutes malicious prosecution does not also mean it is a continuing tort. Anderson's reliance on *Zamos* and *Sycamore* is weakened by the fact that both cases held that a defendant may be liable for malicious prosecution even though the defendant was not responsible for maliciously filing a case. Neither establishes the proposition that malicious prosecution is a continuing tort.

In fact, the argument that malicious prosecution is a continuing tort has been rejected in *Zurich Insurance Co. v. Peterson* (1986) 188 Cal.App.3d 438, 448, where the court held, "The fact that damages increase as the prosecution continues does not transform malicious prosecution into a continuing occurrence." The *Zurich* court rejected the contention that Anderson puts forth, holding instead that the mere ongoing occurrence of the prosecution does not make it a continuing tort. Anderson has not persuaded us that we should depart from *Zurich*.

E. Anderson's Estoppel Argument

Anderson also argues respondents should be estopped from raising any statute of limitations defense because their post-remittitur litigation prevented the action from terminating.

Whatever the nature of the post-remittitur activity, or the specific form of estoppel Anderson alleges applies, Anderson's arguments fail to consider that "[w]here the

material facts are known to both parties and the pertinent provisions of law are equally accessible…, [not even] a party's inaccurate statement of the law or failure to remind the other party about a statute of limitations can give rise to an estoppel." (*Jordan v. City of Sacramento* (2007) 148 Cal.App.4th 1487, 1496.) Both Anderson and respondents were well aware of the Court of Appeal's remittitur. Even in the event that Anderson had been led to believe otherwise, respondents still would not be equitably estopped as Anderson argues.

In regard to judicial estoppel, respondents never contended anything to the contrary insofar as the time the statute of limitations began to run, therefore there are no inconsistent positions upon which judicial estoppel could be applied against respondents as Anderson suggests. (*M. Perez Co., Inc. v. Base Camp Condominiums Assn. No. 1* (2003) 111 Cal.App.4th 456, 465 [judicial estoppel requires that a party assert fundamentally inconsistent positions].)

In view of the foregoing, we conclude that the lower court properly sustained the demurrers as a matter of law and properly entered judgment for respondents.[6]

DISPOSITION

The judgment of the trial court is affirmed. Respondents are entitled to costs on appeal.

WOODS, Acting P. J.

I concur:

JACKSON, J.

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[6] In view of our conclusion with respect to the statute of limitations bar, we conclude the trial court properly granted respondents' section 425.16 motion to strike because there was no possibility Anderson could establish a probability that he would prevail on the merits of his malicious prosecution claim.

ZELON, J.

I respectfully dissent.

With respect to the claims against West Marine, Inc., Pamela J. Fields, and Ian C. Ballon, I cannot join the majority's conclusion that the claims are barred by the statute of limitations. Under the factual circumstances presented by this case, the statute of limitations did not commence to run until the trial court entered judgment. On that premise, appellant timely filed his claims.[1]

This case arises from the trial court's denial of a special motion to strike (Code Civ. Proc., § 425.16).[2] That statute provides for an immediate appeal (§ 425.16, subd. (i)), despite the fact that no judgment has been entered in the case. That is the nub of the issue in this case, and the basis for my conclusion that the statute did not begin to run on issuance of the remittitur.

Respondents, and the majority, rely primarily on the decision of the Court of Appeal in *White v. Lieberman* (2002) 103 Cal.App.4th 210 , reasoning that, as was true in *White*, the decision of the Court of Appeal favorably terminated the underlying action in appellant's favor. While it is correct that in this case, as in *White*, the appellate decision was the determination that favored the respondents, there are two critical distinctions between the cases.

First, *White*'s holding was expressly limited: "Here we hold that when reversal of a trial court judgment in the Court of Appeal gives rise to a possible cause of action for malicious prosecution, the statute of limitations first begins to run on the date the Court of Appeal issues its remittitur." (*White v. Lieberman, supra*, 103 Cal.App.4th at pp. 213-214.) The court expressly acknowledged the general rule that a statute begins to run on

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[1] As set out in footnote 5 of the majority's opinion, this issue affects only the non-attorney respondents because the claims under the one-year statute would be barred under either analysis.

[2] All further statutory references, unless otherwise noted, are to the Code of Civil Procedure.

the entry of judgment, and is then tolled by the filing of the appeal. The question before the court was thus when the tolling period ends, and the statute begins to run again. What the court decided is that the date of remittitur should be that time, whether there was a reversal or an affirmance of the judgment entered by the trial court. It did not purport to decide what would happen where, as here, there has never been a judgment at all. I do not quarrel with the conclusion reached in *White*, nor with the intention to establish a bright-line rule that clarifies the end of the tolling period; where there is no judgment, however, I see no basis to depart from the established bright line rule that commences the statutory period on the entry of judgment.

The second difference, no less important, arises from the peculiar facts of this case. Here, as the majority points out, the trial court permitted respondent West Marine to amend its complaint while the motion to strike was pending; among other changes, West Marine added a new cause of action which was not addressed by the motion to strike.

On January 28, 2005, after the opinion had been filed, but before the remittitur issued, West Marine asserted that the order from the Court of Appeal would not terminate the case, because it intended to pursue the remaining claims from the First Amended Complaint. It repeated that position in its opposition to appellant's motion for entry of judgment filed on November 9, 2005. Accordingly, as late as one month prior to the entry of judgment, West Marine continued to assert that the case had not been terminated.

Favorable termination being a critical prerequisite to a malicious prosecution case, West Marine's argument, at the most basic level, is that the case should have been viewed by appellant as terminated for purposes of the statute of limitations, but as on-going for any other purpose. Far from establishing a bright line rule to eliminate uncertainty and to allow parties to understand clearly the point at which they must assert their claims, the result in this case leaves the parties in a quandary. The rule respondents urge means that there can be no clear line at all when there is an interlocutory appeal until the court resolves whether the case is over. The requirement that there be a judgment in the case before the statute of limitations begins to run, however, has always provided the

clear and bright line the litigants and the courts seek; we should not deviate from that position.

ZELON, J.